COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000711-D
(2014-CA-001782)

PADUCAH INDEPENDENT SCHOOL DISTRICT — APPELLANT

v.

McCracken Circuit Court
2011-CI-00316

PUTNAM & SONS, LLC — APPELLEE

BRIEF FOR APPELLANT, PADUCAH INDEPENDENT SCHOOL DISTRICT

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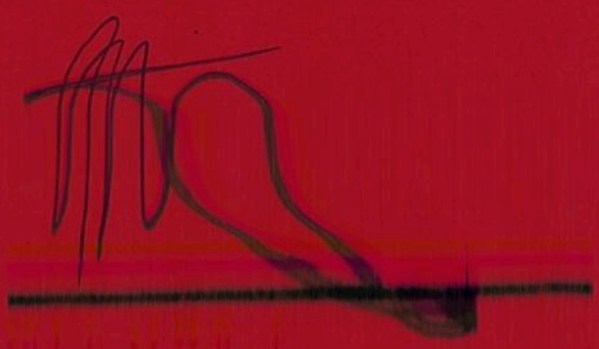
CERTIFICATE OF SERVICE

I hereby certify that ten (10) originals of the foregoing have been served via Federal Express upon: **Susan Stokley Clary, Clerk of the Supreme Court of Kentucky**, State Capitol, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601; and that a true and correct copy of the foregoing has been served by regular U.S. mail upon: **Samuel Givens, Jr., Clerk of the Kentucky Court of Appeals**, 300 Democrat Drive, Frankfort, Kentucky, 40601-9229; and a true and correct copy of the foregoing has been served by regular U.S. mail upon: **Hon. Craig Z. Clymer,** Circuit Court Judge, Division II, McCracken Circuit Court, P.O. Box 1455, Paducah KY 42002-1455; **Dan Biersdorf, Esq.,** Biersdorf & Associates, P.A., 150 South Fifth Street, Suite 3100, Minneapolis, MN 55402 and **Samuel J. Wright, Esq.,** P.O. Box 7766, Paducah, Kentucky 42002-7766, *Attorneys for Appellee*; this 23rd day of June, 2016.



Nicholas M. Holland

INTRODUCTION

This is an eminent domain case in which the trial court was tasked with determining just compensation for the taking of a 2.79-acre gravel parking lot in Paducah, Kentucky.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant does not believe that oral argument would assist the Court in deciding the issues presented. The trial court followed established Kentucky eminent domain law and the Court of Appeals' decision clearly erred in reversing that decision.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In 2011, the only middle school in the Paducah Independent School District ("District") was in poor condition. Instead of repairing the existing facility, the District decided to replace it. However, state law required that the District have a minimum of 11 acres to support a new middle school, which necessitated the taking of thirty-three tracts of property, most of which were improved with low to middle income houses. (Trial Transcript at 20: 4-9) (hereinafter "Trial Tr."). The District successfully negotiated the purchase price of 32 of the 33 properties. The only tract requiring Court intervention is the property at issue in this litigation (the "Subject Property") (Trial Tr. at 20:23-25). On May 19, 2011, the time of the taking, the Subject Property was a 2.79 acre gravel parking lot surrounded by a chain link fence and was owned by Putnam & Sons, LLC ("Putnam"). (Appraisal Report of Otto Spence at 8, hereinafter "Spence Report", included in the Appendix hereto).

A bench trial was held on July 29, 2014, to determine the value of the Subject Property. The following evidence was put into the record during that trial.

Putnam bought the old Modine Manufacturing properties in 1982. Those properties consisted of three tracts: an 8.3 acre tract located at the corner of Jackson Street and South 31st Street in Paducah ("Warehouse Tract"). The Warehouse Tract was improved with a large manufacturing building and a handful of other outbuildings. The other two Putnam tracts were across South 31st Street. The smallest Putnam tract was a 0.189 acre tract which was a small parking lot located at the corner of Jackson and South 31st Streets. The third Putnam tract, the Subject Property, was located down South 31st

Street away from Jackson Street. An unrelated third party owned a one-story building which separated the smallest parcel from the Subject Property farther down South 31st Street.

Putnam initially used the Modine property for light manufacturing but eventually ceased those efforts in favor of leasing space to third parties for warehousing. Between 2004 and the date of taking, the Warehouse Tract was receiving income solely from warehouse activities. (Spence Report at 52).

At the time of the taking of the Subject Property, Putnam had only two warehouse tenants, plus cell tower rental income. The larger tenant, in terms of rental income, was Wagner Warehousing. Its President, Robert Wagner, testified on behalf of the District, and his testimony revealed the poor condition of the warehouse. The roof was very leaky and several windows were broken throughout the building. (Trial Tr. at 23:4-16). Wagner further testified that to his knowledge, Putnam had not made any effort to repair or maintain the roof area since at least 2007, when Wagner began using the warehouse space. (Trial Tr. at 23:17-19). He even noted that his own workers had patched the roof of the warehouse in order to give Wagner additional storage space. (Trial Tr. at 23:20-24). He also testified that he had no use whatsoever for the Subject Property in connection with his warehousing activities on the Warehouse Tract. (Wagner, 24:5-15).

Indeed, no one testified that Putnam was currently using the Subject Property for any purpose. Neither Putnam's appraiser, Otto Spence, MAI, from Louisville, Kentucky, nor Mr. Putnam claimed that Putnam had any current need for the Subject Property to support its activities on the Warehouse Tract.

George Sirk, MAI, testified for the District as to the value of the Subject Property. He observed the Subject Property and noted that it had not been used by Putnam for some time. (Sirk Deposition at 22-23) (hereinafter "Sirk Depo."). Moreover, although he was familiar with the warehousing activity on the Warehouse Tract, he did not believe that the Subject Property was needed to support those activities or any other activity that was likely to take place on the Warehouse Tract. (Sirk Depo. at 22-23). Based upon his observations and extensive experience in the relevant market, he determined that the Subject Property should be considered a separate, free-standing tract of property, without any connection to the other two Putnam tracts and valued it as such.

Mr. Sirk relied upon comparable sales of other vacant lots in Paducah and determined that the fair market value of the Subject Property was $55,000.00 plus $5,000.00 for the chain link fence, making a total value of $60,000.00. (Sirk Appraisal, Exhibit 1 to Sirk Depo., at 1; 31). He relied upon comparable sales information as well has his knowledge built by having been an experienced commercial realtor and appraiser in the Paducah market for 40 years. (Sirk Depo. at 83). His valuation was slightly higher than the property's tax assessed value of $54,000.00. (Spence Report at 30).

Putnam's expert, Otto Spence, prepared a report and gave testimony which included extensive information regarding the condition of the Warehouse Tract and its improvements. The primary building on the Warehouse Tract was a 130,000 square feet structure built with heavy materials. (Spence Report at 25). The tract also contained four significantly smaller storage buildings ranging in size from 931 square feet to 9,836

square feet. (Spence Report at 25-28). There is no testimony in the record regarding whether or not these four buildings were in use at the time of the taking.

Mr. Spence noted that the large warehouse building contained two distinct parts: an office area in the front facing Jackson Street, and the large open space area in the back. The office area had sustained severe leak and mold damage. (Spence Report at 26). Spence estimated that it would cost at least $100,000.00 for general curable physical depreciation or deferred maintenance for the building. (Spence Report at 84). Consistent with the testimony of Mr. Wagner, Mr. Spence noted that the large open warehousing area had extreme roof leak problems. Spence estimated that a new owner would need to invest $300,000.00 to $532,000.00 for a new or nearly new roof, and did not provide any evidence to contradict Mr. Wagner's assertion that Putnam had not performed any repairs on the roof in many years. (Spence Report at 84). He noted that the building's sprinkler system was not operable and did not know the cost of repairing that item. (Spence Report at 25). Mr. Spence concluded his report by determining that the warehouse structure had an economic life expectancy of 0 to 5 years. (Spence Report at 26).

Recognizing that the Warehouse Tract had a very limited economic life in its current condition and could not be considered "unified" with the Subject Property unless it was capable of handling much higher volumes of warehousing, Mr. Spence advanced a "highest and best use" analysis that presumed that someone would invest at least $400,000.00 to fix the leaky roof on the warehouse facility, thereby expanding the available space for warehousing. This leap of logic was not supported by any evidence that there was anyone available or interested in making such an investment. It was also

not supported by any evidence that even a hypothetical reasonable business person would have invested $400,000.00 in the dilapidated warehouse building. Moreover, it was directly contrary to the competent evidence in the record, which was that the current owner of the Warehouse Tract had made no recent efforts to repair the warehouse in order to seek high volume warehousing clients.

Mr. Spence then compared his mythical, leak free warehouse building with other significantly newer and apparently leak free warehouses in several parts of Kentucky.[1] In doing so, he concluded that the fair market value of the Warehouse Tract, if improved, would be $1,500,000.00. (Spence Report at 48). He then simply deducted $400,000.00 from the comparable value figure to account for the bad roof and concluded that the Warehouse Tract, alone, had a before taking fair market value of $1,100,000.00.[2]

Mr. Spence next determined the fair market value of the Subject Property, standing alone. In doing so, he compared the Subject Property to properties that were not at all comparable. The Subject Property, sitting across from the deteriorating Modine Manufacturing facility and a half-block off Jackson Street, was said to be comparable to numerous properties near Kentucky Oaks Mall, some of the most attractive and expensive real estate in the county. Mr. Spence also compared the Subject Property to two lots that were on Jackson Street, a busy highway. Although these lots were in the vicinity of the Subject Property, they were directly on Jackson Street and adjacent to the

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[1] Spence was not able to find any comparable property in Paducah or within 70 miles of the city.

[2] Mr. Spence's $400,000.00 repair figure appears somewhat arbitrary. Elsewhere in his report, he states the following: "This building [warehouse building] appears to have an estimated effective age of 40 years and an estimated remaining economic life of 5 to 0 years, only if $300,000.00 to $530,000.00 of capital outlays are injected into the improvement for a new or nearly [sic] roof covering." (Spence Report at 84).

well-maintained municipal golf course. After making his analysis, Mr. Spence opined that the Subject Property, standing alone, had a fair market value of $608,000.00, nearly more than ten times the market value proposed by Mr. Sirk. (Spence Report at 73).

The trial court considered the evidence presented by both parties and came to several reasoned conclusions. First, the trial court considered the unity argument presented by Mr. Spence. The Court considered that the subject property was not then being used for large-scale warehousing and that there was "no testimony that the Subject Property has been used to support or in connection with the [Warehouse Tract] since Modine ceased operations in 1980." (Findings of Fact and Conclusions of Law at 8; (hereinafter "Findings"); Record on Appeal at 244 (hereinafter "RA").) Given the dearth of evidence that the tracts had been used in a unified manner at any point in the last thirty-plus years, the Court rejected Mr. Spence's argument that the highest-and-best use of the Subject Property was in unity with the surrounding properties. Although the court imprecisely stated that it was rejecting the "before/after analysis," its meaning was clear, the Court was unconvinced, based on the evidence before it, that the properties were sufficiently unified in use (whether actual or theoretical). As a result, it only considered further evidence regarding the value of the Subject Property as a separate tract.

The trial court then considered the valuations offered for the Subject Property, standing alone. The court considered the testimony offered by both parties, including the expert opinions and the comparables offered by each expert. The Court noted that the District's expert, George Sirk, offered a value of $60,000 based on his "41 years of appraising property in the Paducah area, his knowledge of the local market, the fact that

Paducah had a large number of vacant property, that the Modine property was in general disrepair, and that the whole had been marketed for 'years' with no significant interest." (Findings at 7; RA at 243). However, the Court did not find the comparable sales used by Mr. Sirk particularly persuasive because they were not arms-lengths transactions or "involved properties where the highest and best use was not the same high level of commercial use that is enjoyed by the Subject Property." (Findings at 11; RA at 247).

The Court further considered the report of Mr. Spence, which placed a value of $608,000.00 on the property, as well as Putnam's post-trial brief, which advocated for a $685,000.00 valuation. The Court rejected the estimates offered by Putnam, however, noting that they were "far too high to be reasonable." Citing *Commonwealth of Kentucky v. Tyree*, the Court stated that "if a value estimate is so extravagant as to be contrary to common knowledge and to the point where 'it passes the bounds of credibility to reasonable men', then it should be disregarded." *Id.* at 10; RA at 246.

Faced with only one expert report that it gave any probative value (that of Mr. Sirk), the court turned to other evidence in the case to establish a fair market value. Specifically, the court considered the value placed on the property in 2002 by the owner. Relying upon the sworn-to consideration statement set forth in a deed between the Putnam & Son partnership and Putnam & Sons, LLC, the court established the value of all of the parcels of land at $550,000.00. The court did not account for any deterioration of the properties, despite the fact that deterioration was apparent during the decade that had transpired. The court then subtracted the value that had been paid for the remainder

of the property in a recent sale, $435,000.00 (Warehouse and 0.189 acre tract), to arrive at its final valuation of $115,000.00. *Id.* at 11; RA at 247.

Following the Court's judgment, Putnam appealed the case to the Kentucky Court of Appeals. In its appeal, Putnam argued the following points which are relevant to this appeal (1) that it was an error of law for the trial court to refuse to consider the Subject Property as a unified whole with the other Putnam-owned properties, (2) it was error for the trial court to use its "general knowledge" in rejecting the valuation evidence of Putnam's expert, and (3) it was error for the trial court to perform a "before-and-after" analysis based on the 2002 deed and other evidence. The District responded, arguing that the trial court was well within its rights as fact finder to consider the Subject Property separately because of the complete lack of evidence that the properties were likely to ever be used as a unified whole. It further argued that the trial court's valuation was based on the record evidence and was within the range of proposed values, and, therefore, was entitled to substantial deference and affirmation by the Court of Appeals.

Following oral argument, the Court of Appeals issued its decision and reversed the trial court. First, the Court of Appeals found that the trial court had failed to adequately consider all of the evidence in rejecting the highest and best use proposed by Putnam. Namely, the Court of Appeals stated that the trial court had not "evaluated the potential that the best use of the whole property was for a major warehousing operation utilizing the Subject Property for large semi-trailer trucks." (Court of Appeals Opinion at 16.) The Court of Appeals further held that the trial court's methodology utilizing the fair market value of the Subject Property from the 2002 deed was "perplexing" because,

in the Court of Appeals opinion, the court was relying on the unity approach that it had rejected and because the 2002 deed was between interrelated parties. It is from this opinion that the District sought the Supreme Court's review.

ARGUMENT

This Court should reverse the opinion of the Court of Appeals and affirm the trial court's award for two reasons. First, the Court of Appeals misapplied the highest and best use test and endorsed a vision of that test which is in contradiction to established Kentucky law. Second, the Court of Appeals impermissibly invaded the trial court's discretion in establishing a fair market value for the property.

1. The Court of Appeals Misapplied the Highest and Best Use Test.

In this case, the trial court, based on competent evidence, correctly concluded that the Subject Property should be valued as a separate tract. On appeal, the Court of Appeals made a significant and reversible error in law by reversing the trial court's decision and holding that Putnam's application of the highest and best use test was appropriate and should have been more fully considered in the trial court's analysis under the unity rule.

In the trial court's Findings, it is clear that the judge considered all of the relevant factors in deciding to value the property as a separate tract. The court considered how the property was being used at the time of the taking and whether the subject property had ever been devoted to a separate use, stating that the Subject Property was currently a "gravel lot surrounded by a chain link fence" with "no improvements." (Findings at 2; RA at 238). The trial court noted that any existing warehousing activity was "confined to

the various structures located on the [Warehouse Tract]." *Id.* at 8; RA at 244. In doing so, the judge relied upon the testimony of the largest tenant of Putnam, which "establishe[d] that the Subject Property was not being used to support the Large Tract while his company leased the Modine properties." *Id.*

The court also evaluated the highest and best use of the Subject Property, considering the long history of the multiple tracts and the relevant market. The court discussed the poor repair of the buildings on the Warehouse Tract, citing to the testimony of Mr. Wagner that the roof of the warehouse "leaked extensively" and that Mr. Wagner "could use only portions of the building where rain did not penetrate onto the floor of the structure." *Id.* at 3; RA at 239. The court further considered the history of repairs on the warehouse tract, which showed that the current owner had not made any in recent memory. *Id.* at 4; RA at 240. The trial court also made reference to the historical use of the properties noting that "there was no testimony that the Subject Property has been used to support or in connection with the [Warehouse] Tract since Modine ceased operations in 1980." *Id.* at 8; RA at 244. The court discussed the testimony of Mr. Sirk, who stated that "Paducah had a large number of vacant property [sic]" and that the tracts "had been marketed for 'years' with no significant interest." *Id.* at 7; RA at 243. Finally, the court noted that the Subject Property was not needed for the Warehouse Tract to continue being utilized as a warehousing facility in its current state. *Id.* at 8; RA at 244. Based upon all of these factors, the court determined that the Subject Property's highest and best use was as a separate tract.

In its decision, the Court of Appeals wrongly determined that the trial court had not undertaken a sufficient analysis, based on a distortion of the highest and best use test. The Court of Appeals wrote:

> The circuit court should have considered how the subject property was being used at the time of the taking, whether the subject property had ever been devoted to a separate use, and finally what was the subject property's best and highest use. The circuit court erred in limiting its analysis of use to only the current use by Wagner, Putnam's most recent tenant. As noted in *Big Rivers*, supra, a condemnee is entitled to just compensation based on the property's highest and best use, even though the property might not then so be used.

(Court of Appeals Opinion at 15-16). In doing so, the Court of Appeals endorsed an interpretation of the "highest and best use" analysis that is not consistent with Kentucky law and is potentially limitless.

The goal of any eminent domain case is to determine the fair market value of the property taken. The following is the definition of fair market value in Kentucky:

> The fair market value may be stated as the price in which an owner who desires to sell but is not required to do so would sell the property <u>in its then condition</u> to a purchaser who desires to purchase but is not compelled to do so. . . . [I]t is not the "value to the owner" that is the criterion any more than it is the "value to the taker." (Citations omitted) (Emphasis added).

Commonwealth v. Darch, 374 S.W.2d 490, 491-2 (Ky. 1964)

In determining such fair market value, the highest and best use of the property must be considered. Typically, the highest and best use is the current use of the property in its current condition. This is not always the case, however, as the Court may also

consider a property's "adaptability for particular uses, even though the property is not then being so used." *Big Rivers Electric Corporation v. Barnes*, 147 S.W.3d 753, 757 (Ky. 2004). A property owner seeking to rely on a prospective use, however, bears the burden to show that there is actually a *reasonable expectation* that the property will be used for the other, presumably more valuable use, within the foreseeable future. The Supreme Court summarized this concept as follows:

> [W]e recognize that evidence can be adduced that the highest and best use might be something other than the present use but in order for this to be true there must be an expectation or probability in the *near future* it will be so used.

Big Rivers Electric, Id. at 757-58 (internal citations and quotation marks omitted). It further noted that, "[t]he property must not only be *available* for a future use but there must be a *reasonable expectation* that it will be so used." *Id.* at 757. In *Big Rivers*, the property owner successfully argued that the highest and best use of his farm property was as a short to long term coal reserve, based upon presently ascertainable coal deposits on the property at the time of the taking. Id. at 758; *See also Louisville Gas & Elec. Co. v. Diemer*, 443 S.W.2d 647 (Ky. 1969).

Kentucky's sister state courts agree on this fundamental point. As the Virginia Supreme Court noted in a condemnation case:

> It is the present actual value of the land with all its adaptations to general and special uses, and not its prospective, speculative or possible value, based on future expenditures or improvements, that is to be considered. Compensation should be awarded upon the basis of the most advantageous and valuable use of the land, or, stated differently, its highest and best use, having regard to the

> existing business demands of the community or such as may reasonably be expected in the near future.

Appalachian Power Co. v. Anderson, 187 S.E.2d 148, 152 (1972). The Court of Appeals in this case ignored this fundamental rule and should be reversed.

In this case, there was ample evidence to describe the condition of the Subject Property and its reasonably expected uses of the Subject Property at the time of the taking. As noted above, the trial court clearly and correctly relied upon this evidence to determine that, in all reasonable likelihood, the highest and best use of the Subject Property was as a separate tract.

The only evidence to the contrary, and that endorsed by the Court of Appeals, was Putnam's expert report, which was based on a hypothetical set of circumstances that had no reasonable likelihood of ever occurring. Putnam's expert argued that an investment of $400,000.00 would make the warehouse building a viable and fully functioning warehouse facility which would need the space provided by the Subject Property to aide in its operations and thus give a "unity of purpose" to the properties that did not exist before. In order to accomplish this feat, Putnam's expert made a series of fanciful and wholly speculative assumptions:

(a) Assume that someone would invest at least $400,000.00 to fix the severely leaking roof of the main building.

(b) Assume that fixing the roof, alone, would make the building fully functional as a warehouse.[3]

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[3] Putnam's expert noted that the front office section of the large building had incurred severe ceiling damage and had mold, all of which would cost at least $100,000.00 to repair. The expert report stated that it did not know the condition of the building's sprinkler system. Mr. Bob Wagner testified that many of the windows in the building had been broken.

(c) Assume that the Putnam building with its $400,000.00 roof repair was comparable to fully functioning warehouse and manufacturing facilities which had recently been sold, were significantly newer, and were located in areas more than 70 miles from Paducah.

There is no factual support for these assumptions.

Nevertheless, Putnam's expert, Mr. Spence, then compared the Putnam building to the other attractive properties and reached a value for the Putnam property. In an apparent act of fairness, he deducted $400,000.00 for roof repair from the valuation of the hypothetical fully functioning Putnam building, but the remaining value had still been artificially inflated by comparing the Putnam building to buildings of much higher quality. Because of their speculative nature, the trial court rightly rejected Mr. Spence's assumptions, looking instead to the reality of the situation, in which the court noted that the Subject Property was not then being used and had not been used in more than thirty years in connection with the property across the street and that there was no evidence that would change. It was not that the trial court failed to consider Putnam's proposed highest and best use, it was simply that the court did not find it supported by the evidence.

Despite the language and purpose of the highest and best use theory and the trial court's appropriate rejection of the methodology used by Putnam, the Court of Appeals committed reversible error by endorsing Putnam's version of the highest and best use test which would allow Putnam to speculatively transform its dilapidated building into a thriving warehouse which would then, theoretically, have use for the Subject Property, thereby making the Subject Property an integrated whole with the other properties. Effectively, the Court of Appeals improperly reversed the burden of proof by endorsing

Putnam's perversion of the highest and best use rule. In order to argue that one's property has a different highest and best use, the owner has the burden of showing that "there [is] an expectation or probability in the near future it will be so used." *Big Rivers*, 758. The Court of Appeals turned this requirement on its head by requiring the District to rebut Putnam's theoretical and speculative arguments. The heart of the Court of Appeals' improper analysis in this area is the first paragraph of page 16 in the Opinion. In this paragraph, the court admits that Mr. Spence's projections are based on his opinion, but the court apparently mistakes such opinion as evidence that improvements to the building are reasonably expected in the near future. However, Putnam offered no facts to support the probability in the near future that its warehouse would be magically transformed and all of the evidence in this case is to the contrary. Putnam was allowing its building to deteriorate and it had made no improvements or repairs since 2007. Putnam presented no evidence that anyone was willing to make any investment in the building, now or ever.

As is clear from the Opinion, the Court of Appeals misapplied the highest and best use test by endorsing Putnam's argument that its property's highest and best use is not just as a warehouse, in its current condition, but as a warehouse that is fully repaired, functional and thriving (and therefore unified with an otherwise separate property). The fundamental problem with the Court of Appeals' decision is that it treats Putnam's rank speculation regarding the potential value of the property as *evidence* that the property would be put to such use in the near future and ignores the other evidence to the contrary relied upon by the trial court. The danger of such a perverse highest and best use analysis

is apparent: it would essentially allow property owners to inflate the value of their properties based on the theory that someone will undertake wholly speculative future improvements. The owner of an unimproved commercial lot could argue that a future potential buyer would build a strip mall on the location, which would make the property much more valuable than the raw land, and then simply subtract the estimated cost of such improvements to reach a value that is significantly more than the land itself. It is easy to conceive of other abuses of this technique, which is why it was flatly rejected by a New Jersey court in rejecting a valuation that began by "assuming that the building was already improved and then deducting the costs of improvement" because "[s]peculative improvements to the property, that do not exist on the valuation date, cannot be considered in valuing [a condemned] property." *New Jersey v. 200 Route 7, L.L.C.*, 22 A.3d 1012, 1017-18 (N.J. Super. A.D. 2011). The court further opined that "[t]here are uses and costs involved, beyond improvement costs, that must be considered" in determining fair market value." Id. at 1017.

The Court of Appeals committed a grievous error by setting forth a new highest and best use test that allows a property owner to argue that the highest and best use of its property is in its theoretically and speculatively improved condition without any evidence that such repairs or improvements are likely. This sets a dangerous precedent that the Supreme Court should not let stand, particularly in a published opinion. For these reasons, the Court of Appeals' decision should be reversed and the trial court affirmed.

2. The Court of Appeals Improperly Invaded the Discretion of the Fact Finder.

The Court of Appeals also erred in this case by invading the discretion of the trial court and improperly substituting its own judgment for the judgment of the fact finder.

In an eminent domain proceeding, the fact finder has the right to determine the fair market value of the property taken within the scope of the evidence presented and is entitled to substantial deference. In particular:

> Where the amount [of the verdict] is within the range of conflicting testimony, and thus has tangible evidentiary support, it will be sustained unless it is palpably inadequate or excessive. *Nichols on Eminent Domain* POL. 5 Section 17.3.

Pierson v. Commonwealth, 350 S.W.2d 487, 489 (Ky. App. 1961). This is true whether the case is tried before a judge or before a jury. *See Portland Natural Gas Transmission System v. 19.2 Acres of Land*, 318 F.3d 279, 281 (1st Cir. 2003) (stating in a case decided by a bench trial that "determining the value of real estate is not a science, and the decision of a lower tribunal is ordinarily not disturbed unless 'grossly inadequate or excessive'") (*citing* 4A Julius L. Sackman, *Nichols on Eminent Domain § 17.1[4], 23.01* (rev.3d ed.2001); *Adams Apartments Ltd. Partnership v. City of North Adams*, 940 N.E.2d 494, 499-500 (Mass.Ct.App. 2011). In jury trials, it is common for juries to reach a verdict that is between expert opinions regarding fair market value of property. Due to the secrecy of jury deliberations, how the jury arrives at a compromise figure is often unknown, but it is nevertheless permitted and upheld unless palpably wrong. The trial

court, as fact finder, is entitled to the same deference. That is, the trial court has the right to effect a compromise regarding the fair market value of property based on the evidence that the court finds most credible, and that determination should not be disturbed by the Court of Appeals unless "palpably inadequate or excessive." The Court of Appeals in this case ignored this mandate and committed reversible error.

In this case, the trial court determined that the fair market value of the Subject Property was $115,000.00, which amount was well within the range of proof presented and almost double the valuation made by the District's expert. The Court of Appeals did not characterize or find that the trial court's value was "palpably inadequate or excessive," and therefore should have affirmed the trial court's decision.

The trial court's reasoning was based on competent evidence. First, the Court was acting within its discretion in its treatment of the expert witnesses of this case. The Court found fault with both experts and discussed why he believed each of the expert opinions to be persuasive or non-persuasive. Moreover, he was within the law when he determined that the $608,000.00 valuation advanced by Putnam's expert was unreasonable As stated in *Commonwealth v. Tyree*, 365 S.W.2d 472 (Ky. App. 1963):

> Another situation is where the estimate of value by the witness is so extravagant as to be contrary to common knowledge. In the latter situation the evidence may be considered to have the quality of conviction up to the point where it passes the bounds of credibility to reasonable men.

Id. at 475. The significance of this language from *Tyree* lies in its use of these words: "common knowledge" and "credibility to reasonable men." These words emphasize the appropriate influence of common sense and knowledge used by any fact finder in a

condemnation case, whether it be the trial judge or the jury. Here, the trial court simply found the proposed value by Putnam's expert to be lacking credibility based on what the fact finder knew about the property from the evidence presented and from his own general knowledge.

The Court of Appeals appears to argue, incorrectly, that the trial court, as fact finder, is bound by the expert opinions, either from the parties or from a court appointed expert that it suggests the trial court employ. (Court of Appeals Opinion at 20). The Court of Appeals is effectively telling trial courts, as fact finders, that they may not use common sense, common knowledge, or the perception of a reasonable person in establishing the value of a property. At base, the Court of Appeals was unsatisfied with the expert testimony in this case and the trial court's efforts to resolve the conflicting testimony, but this does not warrant reversal.

Similarly, the trial court's reliance on the 2002 deed between the Putnam entities was reasonable and not clear error. Mr. Putnam testified that $30,000.00 of the stated consideration of $580,000.00 was for personal property, so the trial court assumed a value of $550,000.00. The Court of Appeals was correct in noting that Kentucky courts generally do not consider comparable sales beyond approximately eight years especially probative, but there is simply no "hard and fast" rule prohibiting consideration of such sales. Moreover, the consideration statement on the deed is more than a simple estimate between related parties which might not be expected to reflect fair market value, as suggested by the Court of Appeals. Instead, it is a sworn certification by the parties to the deed of the present fair cash value of the property, which is admissible in

condemnation cases. *Smith v. Vest*, 265 S.W.2d 246, 250 (Ky.App. 2007); *Commonwealth v. Allie*, 391 S.W.2d 385 (Ky.App. 1965). Such evidence is admissible on the theory that it is an admission against interest when the value shown is fixed by the landowner. *Commonwealth v. Rankin*, 346 S.W.2d 714, 717 (Ky.App. 1960). Putnam is one of the parties to the 2002 deed.

The trial court was also reasonable in assuming that the Putnam property had not appreciated significantly in value since 2002. Mr. Putnam did not present any evidence that he had made any improvements on the property since 2002 and Putnam's major tenant stated that he was unaware of any improvements or repairs to the property since 2007. The trial court then deducted the recent sale to a third party of the Warehouse Tract and small remaining parking lot for a total of $435,000.00 from the $550,000.00 valuation of all tracts set by the Putnams in 2002. This yielded an award of $115,000.00.

The Court of Appeals may not have approved of the route taken by the trial court in arriving at its determination of the fair market value of the Subject Property. However, despite the road taken, the Circuit Court arrived at the appropriate and legally sustainable destination of a market value well within the range of the proof and not palpably excessive or inadequate. The fact that the Circuit Court reached a legally sustainable finding merits the affirmation of its decision, and this Court should reverse the Court of Appeals and affirm that award.

CONCLUSION

The Court of Appeals clearly erred by finding that the trial court failed to adequately consider the highest and best use of the property and by endorsing the highest and best use proposed by Putnam. It further erred by failing to give adequate deference to the trial court's determination of just compensation. As a result, this Court should reverse the Court of Appeals and affirm the decision of the trial court.

Respectfully submitted,
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